Nos. 16,622 and 16,590

IN THE

United States Court of Appeals

For the Ninth Circuit

CLYDE BATES, *Appellant,* vs. FRED R. DICKSON, Warden, California State Prison at San Quentin, California, *Appellee.*	No. 16,622
MANUEL JOE CHAVEZ, *Appellant,* vs. FRED R. DICKSON, Warden, California State Prison at San Quentin, California, *Appellee.*	No. 16,590

APPELLEE'S BRIEF.

STANLEY MOSK,
Attorney General of the State of California,
ARLO E. SMITH,
Deputy Attorney General of the State of California,
600 State Building, San Francisco 2, California,
Attorneys for Appellee.

Subject Index

Table of Authorities Cited

Cases

Statutes

Nos. 16,622 and 16,590

IN THE

United States Court of Appeals

For the Ninth Circuit

CLYDE BATES, *Appellant,* vs. FRED R. DICKSON, Warden, California State Prison at San Quentin, California, *Appellee.*	No. 16,622
MANUEL JOE CHAVEZ, *Appellant,* vs. FRED R. DICKSON, Warden, California State Prison at San Quentin, California, *Appellee.*	No. 16,590

APPELLEE'S BRIEF.

STATEMENT.

Petitioners Bates and Chavez, along with one Manuel Hernandez, were jointly tried, charged and convicted of six counts of murder in the first degree and punishment for Bates and Chavez was fixed at death. Hernandez was sentenced to life imprisonment.

Likewise, the three defendants were charged, tried and convicted of arson, a violation of § 448a of the California Penal Code. In brief, the defendants were accused of having participated in an argument and fight in the Mecca Bar and threatened to get even. They left the bar, obtained gasoline, threw the gasoline through the front door of the bar and ignited it. As a result, five persons were killed by carbon monoxide and the sixth death was caused by asphyxiation and burns.

The appeals of Bates and Chavez were automatically before the California Supreme Court under California practice. A separate notice of appeal was filed by Hernandez and the California Supreme Court disposed of all three cases in *People v. Chavez,* 50 Cal.2d 778. The United States Supreme Court denied the petition for writ of certiorari. *Chavez v. California,* 358 U.S. 946; *Bates v. California,* 359 U.S. 993.

On August 3, 1959, appellant filed a petition for writ of habeas corpus in the U. S. District Court; the District Court issued an order to show cause on August 5, 1959, returnable August 7, 1959. Appellee filed a return to the order to show cause, together with points and authorities, on August 7, 1959. At the time of the hearing on the order to show cause appellee pursuant to the case of *Brown v. Allen,* 344 U.S. 443, lodged with the District Court a copy of the Clerk's Transcript and Reporter's Transcript of the murder trial of Bates and Chavez.

There is nothing in the record which indicates petitioners filed a traverse to the return and appellee

has no specific recollection of the matter; however, it has long been the custom for appellee to stipulate that the petition can be deemed the traverse to the return and appellee is willing to stipulate that the petition may be deemed a traverse for the purposes of this appeal.

On August 7, 1959, the U. S. District Court entered an order denying the petition for writ of habeas corpus. On that same date a notice of appeal was filed and the District Court issued a certificate of probable cause.

APPELLANTS' CONTENTIONS.

1. The District Court erred in refusing to examine the state court record before ruling; the District Court should have called for the exhibits and the District Court should have taken additional evidence on the allegations concerning the alleged inaccuracy of the statements used against appellants.

2. California's construction of the word "arson" resulted in a denial of appellants' constitutional rights; such construction rendered the section *ex post facto* and in violation of due process and resulted in appellants being convicted upon a charge not made.

3. The accumulation of errors in the introduction of evidence, in the argument to the jury, and in the comments by the trial judge resulted in a trial so unfair that it violated due process.

SUMMARY OF APPELLEE'S ARGUMENT.

I. The District Court may properly rely upon the opinion of the California Supreme Court as a part of the record and need not review the complete record of the state proceedings.

II. Appellants were charged with the crime of murder; neither the statute defining murder nor the counts in the indictment referred to "arson"; the interpretation of the word "arson" in the California statute dividing murder into degrees is a question of state law and involves no federal question.

III. The proceeding in the state court afforded appellants due process; none of the alleged "errors" cited by appellants involve a substantial federal question.

A. The introduction of the statements of the two co-defendants involves no substantial federal question.

B. The allegations concerning the introduction of inflammatory photographs and the alleged misconduct of the prosecuting counsel present no substantial federal question.

ARGUMENT.

I.

THE DISTRICT COURT MAY PROPERLY RELY UPON THE OPINION OF THE CALIFORNIA SUPREME COURT AS A PART OF THE RECORD AND NEED NOT REVIEW THE COMPLETE RECORD OF THE STATE PROCEEDINGS.

The appellants rely upon various language from the case of *Brown v. Allen,* 344 U.S. 443. They assert

that the District Judge held that the state consideration of the question had foreclosed his own consideration. They further contend that the District Court had the *duty* to review the record and that the cases require that the judge *must* examine the entire state record.

Appellants also place much stress upon the allegation that there was a substantial discrepancy between the tape recordings of a conversation and a transcription of that statement which was introduced in evidence. They further allege that this is a "vital flaw" in the state court record requiring the taking of additional evidence. They further contend that the allegations of misconduct and the erroneous introduction of evidence resulted in a proceeding that contained a "vital flaw", thus requiring an examination of the proceeding beyond the record.

At the time of the order to show cause the appellee lodged with the court the reporter's transcript and the clerk's transcript which was used by the California Supreme Court in the automatic appeal. The opinion in the case of the appellants herein is reported as *People v. Chavez,* 50 Cal.2d 778. The District Judge during the argument exhibited complete familiarity with the California Supreme Court decision. However, there is no dispute that he rendered his decision at the end of the argument and without having had an opportunity to examine the transcripts filed with him.

In so ruling, the District Court, however, did not foreclose an inquiry, but simply determined that there

was no question raised which required him to go beyond the opinion of the California Supreme Court, since the petition itself did not raise a substantial federal question. The court in this circumstance was not required to look beyond the opinion of the California Supreme Court.

The District Court was not required to go beyond the opinion of the California Supreme Court in the circumstances of the present case. Appellants' contention that the District Court *must* go beyond the opinion of the state court is not supported by the cases cited. The rule sought by appellants is inflexible and impracticable. Such a rule is not fitted to the requirement that the writ should be summarily heard and disposed of as law and justice require. See 28 U.S.C. 2243.

Contrary to appellants' contention the District Court did not consider itself foreclosed from determining the questions presented. It is clear from the proceedings held in the District Court that the District Court did not consider itself foreclosed. The District Court determined that the allegations of the petition failed to state a substantial federal question. The District Court was not required to go beyond the opinion of the California Supreme Court for this very reason. As indicated by the subsequent discussion, the allegations contained in the petition for the writ failed to raise substantial federal questions.

The allegation in the petition concerning the *"ex post facto"* construction of the word "arson" in the California statutes presents no question involving a

dispute as to the facts. The petition points out no facts different from or not contained in the opinion of the California Supreme Court which bear upon the construction of the statute. All parties to this proceeding concede, and there is no dispute, that the appellants were charged with murder and with a violation of section 448a of the California Penal Code. There is no dispute that this is the first Supreme Court decision in California which discusses section 189 of the Penal Code in reference to the word "arson" and section 448a of the Penal Code. Appellee has contended and does contend that this is purely a question of state law. Appellants contend that the construction of this statute by the California Supreme Court involves their federal constitutional rights. In any event, there can be no dispute but that this question can be resolved upon the facts set out in the opinion of the California Supreme Court. It is clear that the District Court was not required to go beyond the opinion of the California Supreme Court.

The other allegations of the petition are concerned with the introduction of certain statements against the defendants, misconduct of the District Attorney and the judge and the alleged erroneous introduction of photographs. These questions do not involve a substantial federal question as indicated by the subsequent discussion. The District Judge thus properly denied the petition without proceeding to read the entire record of the state proceedings.

There is no contention by appellants that the facts set out in the opinion of the California Supreme

Court differ from the record other than in one instance. They do contend that the tape recording of the statements used in the state court were substantially different than the transcription which was introduced in evidence. However, as it is noted subsequently, the appellants do not allege that this question was raised in the state Supreme Court. They simply allege that the question was raised at the time of trial. Indeed, it is apparent that they cannot allege that the question was raised in the state Supreme Court. The question is thus not discussed in the opinion of the California Supreme Court. This question was thus not properly before the District Court. See 28 U.S.C. 2254, and the subsequent discussion under heading III of this brief.

The contention that the District Court *must* review the entire record and that such is the *duty* of the court is based upon a misinterpretation of the cases. Appellants place great reliance upon the case of *Brown v. Allen,* 344 U.S. 443. That opinion, however, was concerned with the question of whether or not the District Court erred in refusing a writ on the basis of an examination of the record in the state and federal courts instead of holding a *"de novo"* trial on the federal constitutional issues. See *Brown v. Allen, supra,* at 460.

That decision was concerned with the question of whether the District Court could deny the writ after reviewing the state record or whether it had to retry the federal questions. That decision holds only that the District Court could properly rely upon the state

record and is not required to hold a hearing. Furthermore, that decision does not hold or require that the District Court review the entire record in the state proceedings. It holds only that the court *may,* rather than that the court *must,* review the record in the state proceedings.

The decision emphasizes the necessity for "flexibility" and notes that it would be "unduly rigid" to call for the state record in every case. *Brown v. Allen, supra,* at 503-504.

Indeed, neither the opinion of *Brown v. Allen* nor any other opinion holds that the opinion of the State Supreme Court is not a part of the state court record.

The case of *U. S. ex rel. DeVita v. McCorkle,* 216 Fed.2d 743 (3rd Cir. 1954) presents a far different situation than the present case. In that case the state prisoner under death sentence applied for a writ of habeas corpus the day before the time and place of execution were to be announced. The District Judge apparently felt that he had to dispose of the case immediately. The Court of Appeals asserted that the District Judge felt himself circumscribed by the time element. It is thus obvious that the District Court limited his review to the opinion of the state Supreme Court as a result of what he deemed to be the pressure of time. This situation is not present in the instant case. The date of execution was scheduled for more than one week after the date set for the filing of the return to the order to show cause. It is thus apparent that the District Judge did not believe himself, and was not, circumscribed by time. Indeed,

the District Court made it perfectly plain that his refusal to review the complete record in this case was based on the ground that he believed there was no substantial federal question presented.

It should be noted that the court in *Rogers v. Richmond,* 252 Fed.2d 807 (2nd Cir.), cert. den. 357 U.S. 220, declared that it was improper for a District Judge to hold a hearing *de novo* without examining the state record and finding a "vital flaw" or "unusual circumstances".

The appellants attempt to bring themselves within the language of *Brown v. Allen,* 344 U.S. 443, which states that the District Court may rely upon the determinations of a factual issue by the state courts in the absence of a "vital flaw" in the manner in which the question was determined in the state court. In addition to the allegation that the discrepancy between the tape recording and the transcription of the recording which was introduced in evidence was a vital flaw, appellants contend as follows: "That the alleged cumulative error resulted in a vital flaw." Appellants contend that the use of the gruesome photographs and the alleged misconduct of the trial judge was a "vital flaw in the process of ascertaining the facts so that federal intervention was called for."

Appellants have apparently confused the vital flaw doctrine of *Brown v. Allen* with the due process concept itself. The gist of the contention is simply that these "errors" were such that appellants were denied a fair trial within the meaning of the due process clause. If appellants are contending that these fac-

tors constituted a "vital flaw" requiring the court to hold a trial *de novo,* it is difficult to ascertain what evidence beyond the record would be, or could be, called for by the District Judge. Indeed, if an allegation that cumulative errors raise a substantial federal question requiring a trial *de novo,* nearly every state appellate decision would be required to be reviewed by the District Court by the taking of additional evidence on the question of prejudice. The very statement of the proposition discloses the flaw in this reasoning.

Indeed, the question of what constitutes the record and whether or not the District Court is required to review the complete record appears to be an open question in view of the fact that there are no U. S. Supreme Court decisions on this subject. This court should set forth a rule which is both flexible and practicable. It should leave much discretion in the District Court as to whether or not it need call for anything beyond the opinion of the state appellate court. As this court is aware, most murder cases involve lengthy transcripts. The rigid requirement that the District Court must review the entire state record before passing on a petition for writ of habeas corpus would result in an automatic stay in every state death penalty case. This would be so because the filing of such petitions on the eve of execution is not an uncommon practice in these cases. It would be physically impossible for the District Judge to review the entire transcript prior to execution in the all too typical last minute application.

II.

APPELLANTS WERE CHARGED WITH THE CRIME OF MURDER; NEITHER THE STATUTE DEFINING MURDER NOR THE COUNTS IN THE INDICTMENT REFERRED TO "ARSON"; THE INTERPRETATION OF THE WORD "ARSON" IN THE CALIFORNIA STATUTE DIVIDING MURDER INTO DEGREES IS A QUESTION OF STATE LAW AND INVOLVES NO FEDERAL QUESTION.

Appellants contend that the interpretation of California Penal Code section 189 defining murder in the first degree is unconstitutional. They contend that the term "arson" as used in that section as interpreted by the California Supreme Court is erroneous and not in accord with the established California law. Appellants attempt to find a federal question by asserting that such an erroneous interpretation of the California law is *ex post facto.* They also assert that the statute is unconstitutionally vague and that the interpretation of the statute by the California Supreme Court resulted in appellants' convictions on a charge not made.

It should be noted at the outset that the six counts of the indictment, which are pages 1 through 6 of the clerk's transcript lodged with the District Court, do not use the word "arson." All six counts of the indictment charge a violation of § 187 of the California Penal Code and specify only that the appellants wilfully, unlawfully and feloniously killed the named persons, human beings, with malice aforethought. The indictment does not charge the degree of the crime and makes no reference to either arson, torture or premeditation. An additional count of arson, a vio-

lation of section 448a of the California Penal Code, is charged. Indeed, the short form of pleading in California was adopted with the view in mind that a copy of the transcript of testimony taken before the Grand Jury would be a better guide to the charge for which a defendant was being held and tried than detailed pleadings. Under California law a copy of said Grand Jury transcript must be delivered to the defendant or his attorney. (Section 938.1, Calif. Penal Code.)

Section 189 of the California Penal Code divides murder into degrees. That section provides as follows:

> "All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree."

The interpretation of the term "arson" as it is used in section 189 of the California Penal Code is purely and simply a question of state law. Compare *Duffy v. Wells,* 201 Fed.2d 503. Of course this interpretation placed by the California Supreme Court on the term "arson" not only is, but has always been, the law of the State of California and therefore there is no question as to the *ex post facto* nature of the statute.

Furthermore, it should be noted that the California Supreme Court's interpretation of the word "arson"

is entirely consistent with the existing California law. Indeed, the California Supreme Court in 1947 in the case of *In re Bramble,* 31 Cal.2d 43, held that the term "arson" in California includes those acts enumerated in section 448a of the Penal Code. It should be apparent from the reading of the California Supreme Court's decision in *People v. Chavez,* 50 Cal.2d 778, at 787-788, that the interpretation of the word "arson" to include both violation of sections 447a and 448a of the California Penal Code was no "abrupt shift" in interpretation as contended by appellants.

Appellee has no argument with the general principle of law that a criminal statute must contain ascertainable standards of guilt. However, the code sections defining murder are not vague. Neither section 187 of the California Penal Code defining murder nor section 189 of the California Penal Code which divides murder into degrees is vague. The word "arson", as indicated above, has been previously clearly defined by the California Supreme Court to include a violation of section 448a. See *In re Bramble,* 31 Cal.2d 43.

Furthermore, there is no possible comparison between the cases cited by the appellants and this case. *U. S. v. Cohen Grocery,* 255 U.S. 81, involved the violation of a statute making it unlawful for any person to wilfully make any "unjust or unreasonable rate or charge" in handling or dealing in any necessity. The present statute by comparison provides "all murder . . . which is committed in the perpetration or attempt to perpetrate arson . . . is murder in

the first degree." The definition of murder in the first degree is clearly sufficient to enable one to ascertain the degree of their guilt. It should be noted that murder is defined by section 187 of the Penal Code of California in common law terms "murder is the unlawful killing of a human being, with malice aforethought." Certainly the conduct defined by these statutes is fairly ascertainable in contrast with the *Cohen Grocery* case which prohibits "unreasonable prices".

The case of *Winters v. New York,* 333 U.S. 507, at 518-519, involved a statute prohibiting the collection of stories "so massed as to become vehicles for inciting violent and depraved crimes against the person . . . not necessarily . . . sexual passion." It is clear that the specifications of publications prohibited were vague. No analogy can be drawn to the definition of murder and the division of murder into degrees as set out in sections 187-189 of the California Penal Code. The other cases cited by appellants involve statutes which are extreme examples of uncertainty and vagueness.

Likewise, the case of *Cole v. Arkansas,* 333 U.S. 196, is not applicable in the present situation. That case involved affirmance of a judgment on a count which was not charged in the original indictment or information. In the present case the defendants were clearly charged with six murders and the California Appellate Court affirmed those six counts of murder. Appellants were thus clearly notified of the charges against them in contrast to the *Cole* case

where the appellate court affirmed the judgment based on a count not charged.

Appellants attempt to bring themselves within the doctrine of the *Cole* case by urging that the interpretation of the instructions to the jury which used the term "arson" in setting out the degree of murder as charged in the indictment has resulted in appellants being convicted upon a charge not made. It is clear that this argument is identical to the argument that the California Supreme Court's interpretation was *ex post facto*. This contention, of course, has been discussed above. It is apparent that the *Cole* case does not aid appellants, because appellants were charged with murder. They were charged with a violation of section 187 of the California Penal Code which uses the common law definition of murder.

Appellants assert in their briefs that the verdicts could not be supported upon the theory that the murder was perpetrated by means of torture and thus first degree murder under California law. They assert that the indictment did not charge murder by torture. This is quite correct; as indicated heretofore, the indictment also did not charge murder committed in the perpetration of arson. Indeed, as indicated above, under California law the indictment simply charged appellants with violation of section 187 of the California Penal Code—murder. The indictment made no reference and, under California law, need make no reference to the degree.

The jury was instructed on both murder committed in the perpetration of arson and murder committed

by torture. Indeed, in *People v. Chavez,* 50 Cal.2d 778 at 788, the court found that the trial court was justified in giving the instruction regarding murder committed by torture and the evidence was sufficient to support a finding by the jury to that effect. The evidence of torture alone was sufficient to sustain the verdict.

III.

THE PROCEEDINGS IN THE STATE COURT AFFORDED APPELLANTS DUE PROCESS; NONE OF THE ALLEGED "ERRORS" CITED BY APPELLANTS INVOLVE A SUBSTANTIAL FEDERAL QUESTION.

A. The Introduction of the Statements of the Two Co-defendants Involves No Substantial Federal Question.

Appellants complain of statements of co-defendants introduced at the trial. It should be pointed out that as to the statements here involved the trial court instructed the jury not to consider either of them in reference to Chavez. Likewise, the court instructed that the statement of Hernandez was admitted solely as to Hernandez and should not be used in any way with reference to Bates. As the California Supreme Court pointed out, a portion of the statement of Brenhaug should not have been admitted as to Bates. Both statements were admissible in reference to Hernandez. See *People v. Chavez,* 50 Cal.2d 778, 790-791.

It appears that as to Chavez the introduction of the statements clearly presents no federal question. These statements were admitted under common law rules of long standing. They were admitted solely against a

co-defendant with express instructions to the jury to consider them only in reference to the co-defendant. The introduction of such statements with limiting instructions under the long standing common law rules certainly is not contrary to the "Anglo-American concept of ordered liberty" or to basic "fairness" of the trial. The same rule is applicable in Federal courts. As to Bates, it is clear that at most one portion of one of the statements should not have been admitted. However, that statement was the statement of Brenhaug and since Brenhaug also testified to these facts on the stand and was subjected to cross-examination, no question of lack of essential fairness exists. These contentions present no substantial federal questions.

Appellants allege that the transcribed statements of Hernandez and Brenhaug were not accurate representations of the recorded conversations. Presumably these contentions were tried out before the trial judge and found to be without substance. Furthermore, it should be noted that although appellants' trial counsel in the state courts made this contention, no such contention was made and none is alleged to have been made in the California Supreme Court. It has been the long established law that habeas corpus should not be used as a substitute for an appeal. The failure to raise this question in the state Supreme Court has resulted in a waiver. To put it in other terms, the failure of the appellants to raise this question in the California Supreme Court as required by California law has resulted in a failure to exhaust

state remedies within the meaning of 28 U.S.C. 2254. See *Brown v. Allen,* 344 U.S. 443, at 483, 505; also see *Irvine v. Dowd,* 359 U.S. 394.

B. The Allegations Concerning the Introduction of Inflammatory Photographs and the Alleged Misconduct of the Prosecutor Present No Substantial Federal Questions.

Appellants complain about the introduction of alleged inflammatory photographs and certain arguments of the prosecutor. California follows the general rule that photographs should be excluded where their principal effect would be to inflame the jurors. However, if they have a probative value with respect to a fact at issue which outweighs their inflammatory nature, they are admissible. The determination of this question is left to the discretion of the trial court as he is the one best able to make this determination. It should be noted that the photographs which were objected to were relevant to the cause of death, to the origin of the fire and to the "torture" of the victims. These allegations, as well as the allegations concerning the alleged misconduct of the prosecutor, present questions of ordinary procedure and practice which are subject to regulation by the state courts and do not present a federal question.

Furthermore, the allegation to the effect that the trial judge made an improper statement to the effect that the defendants were in fact guilty of arson is a misinterpretation of the judge's remark. It is clear from a reading of the transcript and a review of the opinion of the California Supreme Court (50 Cal.2d 778 at 793) that the trial judge was simply referring

to the legal question of whether or not violation of section 448a was "arson." It is clear from the conversation that he did not intend to take the factual question from the jury. A review of the alleged misconduct by the prosecution and the trial judge is set out in the opinion (50 Cal.2d 778 at 792-793) and the appellee's position in that regard need not be repeated here.

CONCLUSION.

It is respectfully submitted that the order of the District Court should be affirmed.

Dated, San Francisco, California,
March 17, 1960.

STANLEY MOSK,
Attorney General of the State of California,
ARLO E. SMITH,
Deputy Attorney General of the State of California,
Attorneys for Appellee.